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Syarifuddin v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–133 OF 2009
SULONG MATJERAIE, ABDUL WAHAB PATAILAND AZAHAR MOHAMED JJCA
29 DECEMBER 2011

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Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Dangerous drugs found tucked in appellant's jeans — Whether there were serious errors committed in findings of fact by trial judge — Whether cannabis recovered from appellant by police was same cannabis sent to be examined by chemist and subsequently produced in court as evidence — Whether discrepancy in weight of cannabis created doubt as to its identity — Whether appellant's defence had not been adequately considered by trial judge — Whether police witnesses fabricated evidence to frame-up appellant — Dangerous Drugs Act 1952 ss 37(d), (da) & 39B(1)

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Acting on information received, a police party had laid an ambush at a construction site in Dengkil. During that surveillance the officer in charge of the police party had spotted the appellant, a 28-year old Indonesian, entering a corner house in the area. In the parking area in front of the house, the appellant was detained by members of the police party. The appellant tried to

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run away but was apprehended. The police then carried out a body search of the appellant and found a package tucked in the jeans worn by him. The contents of that package were later confirmed by a chemist to be 415g of cannabis. The appellant was arrested and charged with trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). Upon

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the close of the prosecution case the trial judge was satisfied that a prima facie case had been made out against the first accused and called upon him to enter his defence. The first accused who elected to give evidence on oath testified that he was sleeping when the police laid ambush at the construction site and that he only ran from the police because he did not have a valid document to enter

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Malaysia. The appellant further explained that the package, which contained the cannabis, was not found tucked in the jeans worn by him as alleged by the prosecution. Instead the appellant claimed that the package belonged to one 'Abu', who had thrown the package on the ground. At the end of the case for the defence the trial judge found that the appellant had failed to raise a reasonable

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doubt on the prosecution's case. The appellant was thus found guilty of trafficking and sentenced to death. This was the appellant's appeal against that conviction and sentence. The appellant submitted that the gross weight of the cannabis as found by the chemist was 424.6g, while the investigating officer said it was 430g. The appellant thus argued that the discrepancy in the weight

of the cannabis created a doubt as to the identity of the cannabis, which formed the subject matter of the charge. The appellant also contended that there was a break in the chain of evidence concerning the movements of the cannabis. The appellant further submitted that his defence had not been adequately considered by the trial judge.

Held, dismissing the appeal:

(1) There was no doubt at all that the cannabis tendered in court, which formed the subject matter of the charge against the appellant was the one actually seized by the police from the appellant. The officer in charge of the ambush confirmed and identified in court the cannabis, which was seized from the appellant's possession and which he handed over to the investigating officer (the IO) on the same day. The evidence of the chemist had also clearly established that the cannabis which the IO had handed to him for analysis was the very same cannabis which he wrapped up after analysis and returned to the IO. Clearly there was no break in the chain of evidence regarding the exhibits in the present case. Hence, the difference in the weight of the cannabis as found by the IO and the chemist by itself could not be said to have created a doubt as to the identity of the cannabis in question. In the circumstances, the appellant's complaint on the manner in which the exhibits were handled was misplaced (see paras 9–12).

(2) The trial judge was justified in finding at the close of the prosecution's case that the appellant was in possession of the cannabis in question, independently of the presumption of possession under s 37(d) of the Act. Since the weight of the cannabis exceeded the quantity specified in s 37(da)(vi) of the Act, the trial judge was entitled to invoke the presumption of trafficking and to hold that a prima facie case had been established against the appellant. The trial judge's finding that the appellant had the requisite knowledge was also correctly made upon a consideration of the entire circumstances relating to the arrest and the findings of the cannabis (see para 13).

(3) The trial judge had carefully considered and judicially appreciated the two versions, namely the prosecution's version that the cannabis was found tucked in the appellant's jeans and the appellant's version that the package was found on the ground and not on his person, before coming to a definite finding of fact that the appellant had not created any reasonable doubt on the prosecution's case. Based on the totality of the evidence, the trial judge was perfectly entitled to come to this finding of fact and there was no plausible reason to disturb this finding (see paras 14–17).

(4) Further, the appellant's version was tantamount to a grave accusation of fabrication by the police to frame-up the appellant. However, there was

A no evidence to point to a reason or motive as to why the police witnesses would want to fabricate the evidence to frame-up the appellant (see para 18).

[Bahasa Malaysia summary

B Bertindak atas maklumat yang diterima, pihak polis telah melakukan suatu serang hendap di sebuah tapak pembinaan di Dengkil. Semasa pengawasan tersebut, pegawai polis yang bertugas telah mengesan perayu, seorang warga Indonesia berusia 28 tahun, memasuki sebuah rumah paling tepi di kawasan C tersebut. Di kawasan tempat letak kereta di hadapan rumah tersebut, perayu telah ditahan oleh pihak polis. Perayu cuba melarikan diri tetapi berjaya ditahan. Pihak polis kemudiannya menjalankan carian badan ke atas perayu dan menjumpai sebuah bungkusan terselit di seluar jeans yang dipakainya. Kandungan bungkusan tersebut kemudiannya disahkan oleh ahli kimia sebagai 415g ganja. Perayu ditangkap dan didakwa mengedar dadah berbahaya D di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Di akhir kes pendakwaan, hakim bicara berpuas hati bahawa suatu kes prima facie telah berjaya diwujudkan terhadap tertuduh pertama dan memanggilnya untuk memasukkan pembelaan. Tertuduh pertama, yang memilih untuk memberikan keterangan bersumpah, memberi keterangan bahawa dia sedang E tidur apabila polis melakukan serang hendap di tapak pembinaan dan bahawa dia hanya lari daripada pihak polis kerana dia tidak mempunyai dokumen yang sah untuk memasuki Malaysia. Perayu turut menjelaskan bahawa bungkusan yang mengandungi ganja tersebut, tidak dijumpai tersembunyi dalam seluar F jeans yang dipakainya seperti yang didakwa oleh pihak pendakwaan. Sebaliknya perayu mendakwa bahawa bungkusan adalah milik 'Abu', yang telah membuang bungkusan tersebut ke tanah. Di akhir kes pembelaan, hakim bicara mendapati bahawa perayu telah gagal menimbulkan keraguan munasabah ke atas kes pendakwaan. Perayu telah didapati bersalah mengedar G dan dijatuhkan hukuman mati. Ini adalah rayuan perayu terhadap sabitan dan hukuman tersebut. Perayu menghujahkan bahawa berat kasar ganja seperti yang didapati oleh ahli kimia adalah 424.6g, manakala pegawai penyiasat menyatakan ia adalah 430g. Perayu menghujahkan bahawa percanggahan dalam berat ganja mewujudkan keraguan tentang identiti ganja, yang H membentuk hal perkara pertuduhan. Perayu juga menghujahkan bahawa terdapat kelompangan dalam rantaian keterangan mengenai peralihan ganja tersebut. Perayu menghujahkan bahawa pembelaan tidak dipertimbangkan secukupnya oleh hakim bicara.

I **Diputuskan**, menolak rayuan:

(1) Adalah tidak syak lagi bahawa kesemua ganja yang dikemukakan di mahkamah, yang menjadi hal perkara pertuduhan terhadap perayu adalah sebenarnya ganja yang dirampas oleh polis daripada perayu. Pegawai yang bertugas dalam serang hendap tersebut mengesahkan dan

mengenal pasti di mahkamah, ganja yang telah dirampas daripada milikan perayu dan yang mana telah diserahkan kepada pegawai penyiasat ('PP') pada hari yang sama. Keterangan ahli kimia juga telah dengan jelas menunjukkan bahawa ganja yang telah diserahkan oleh PP kepadanya untuk analisa adalah ganja yang sama yang dibalutnya selepas analisa dan dikembalikan kepada PP. Jelas sekali tidak terdapat kelompangan dalam rantaian keterangan mengenai ekshibit dalam kes ini. Oleh itu, perbezaan dalam berat ganja seperti yang didapati oleh PP dan ahli kimia dengan sendirinya tidak boleh dikatakan telah mewujudkan keraguan kepada identiti ganja tersebut. Dalam hal keadaan ini, aduan perayu berkenaan cara ekshibit dikendalikan tidak berasas (lihat perenggan 9–12).

(2) Hakim bicara berjustifikasi dalam memutuskan di penutup kes bahawa perayu memiliki ganja tersebut, bebas daripada anggapan milikan di bawah s 37(d) Akta. Oleh kerana berat ganja melebihi kuantiti yang dinyatakan dalam s 37(da)(vi) Akta, hakim bicara berhak untuk membangkitkan anggapan pengedaran dan memutuskan bahawa kes prima facie telah diwujudkan terhadap perayu. Dapatan hakim bicara bahawa perayu mempunyai pengetahuan yang diperlukan juga diputuskan dengan betul berdasarkan pertimbangan keseluruhan keadaan yang berkaitan dengan penangkapan dan penemuan ganja (lihat perenggan 13).

(3) Hakim bicara telah mempertimbangkan dan melihat kedua-dua versi dengan teliti, iaitu versi pendakwaan bahawa ganja tersebut telah dijumpai tersembunyi dalam seluar jeans perayu dan versi perayu bahawa bungkusan tersebut telah ditemui di atas tanah dan bukan pada dirinya, sebelum membuat dapatan fakta tetap bahawa perayu telah tidak mewujudkan sebarang keraguan munasabah ke atas kes pendakwaan. Berdasarkan keseluruhan keterangan, hakim bicara berhak sepenuhnya untuk membuat dapatan fakta sedemikian dan tidak ada sebab yang munasabah untuk mengganggu dapatan tersebut (lihat perenggan 14–17).

(4) Di samping itu, versi perayu terjumlah kepada tuduhan berat fabrikasi oleh polis untuk memerangkapnya. Walau bagaimanapun, tiada bukti untuk menunjukkan sebab atau motif mengapa saksi polis mahu memalsukan bukti untuk memerangkap perayu (lihat perenggan 18).]

Notes

For cases on trafficking, see *Mallal's Digest* (4th Ed, 2010 Reissue) paras 191–274.

Cases referred to

Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489; [2004] 6 AMR 189, CA (refd)

Loh Kah Loon v PP [2011] 4 MLJ 260, FC (refd)
Mohamed Yatin bin Abu Bakar v PP [1950] MLJ 57 (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19, FC (folld)
PP v Abdul Rahman Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (folld)
Su Ah Ping v PP [1980] 1 MLJ 75, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), (da)(vi), 39B(1), (1)(a), (2)

Suzana Ismail (Suzana Ismail & Partners) for the appellant.
Kwan Li Sa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Azahar Mohamed JCA:

[1] Syarifuddin (the appellant) was charged in the High Court at Shah Alam for trafficking in dangerous drugs, that is to say, cannabis weighing 415g under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The charge reads as follows:

> Bahawa kamu pada 9.7.2003, jam lebih kurang 2.00 petang, di kawasan pembinaan rumah Desa Pinggiran Putra Kampung Limau Manis, Dengkil, dalam Daerah Sepang, dalam Negeri Selangor Darul Ehsan, telah memperedarkan dadah berbahaya iaitu 415 gram Cannabis dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] In brief, the case for the prosecution is this. On 9 July 2003, at about 10am, acting on information received, ASP Azizan bin Said (PW1) and a team of police personnel proceeded to a Desa Pinggiran Putra, Kampung Sungai Manis, Dengkil to lay an ambush at a construction site. Upon arrival at the scene, PW1 instructed his officers to take up various positions. The subsequent events that followed, as testified by PW1, are as follows:

> Setelah menunggu sehingga jam lebih kurang 1.50 petang, saya nampak seorang lelaki bergerak melintas di hadapan kawasan serang hendap menuju ke bahagian porch kereta rumah hujung. Rumah tersebut adalah rumah kembar dua iaitu rumah di sebelah kanan. Sebaik lelaki itu yang kami syaki sebagai suspek sebagaimana maklumat, saya arahkan dua anggota di bahagian belakang rumah tersebut keluar menangkap suspek. Dalam masa yang sama saya dan anggota saya bergerak ke arah suspek untuk membantu menangkap suspek. Semasa melaksanakan proses tangkapan, berlaku pergelutan di mana suspek cuba melarikan diri sehinggalah pasukan saya sampai barulah suspek dapat ditahan.
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> Sebaik sahaja suspek ditahan, saya memperkenalkan diri sebagai polis dengan menunjukkan Kad Kuasa saya. Dari dokumen yang terdapat bersama suspek, beliau dikenali dengan nama Syarifuddin, berumur dalam lingkungan 28 tahun, seorang

warganegara Indonesia berketurunan Acheh. Dengan disaksikan anggota polis saya, saya menjalankan pemeriksaan badan ke atas suspek dan menjumpai satu bungkusan ketulan bahan mampat berbungkus surat khabar Cina dari bahagian dalam dan hadapan seluar suspek. Saya buka bungkusan tersebut dan mendapati ianya satu bahan mampat tumbuhan yang disyaki ganja dibalut dengan kertas timah dan plastik lutsinar di bahagian luarnya. Saya terus menangkap suspek dan merampas barang kes serta membawa balik suspek dan barang kes ke IPD Putrajaya.

[3] Chong Yong Kiong, the chemist (PW4) in his testimony said that he examined and analysed the slab of compressed plant material. PW4 confirmed that the plant material was cannabis as defined in s 2 of the Act weighing 415g.

[4] At the close of the prosecution's case, the learned judge came to the finding that the prosecution had succeeded in proving a prima facie case and he therefore called upon the appellant to enter his defence. The appellant gave evidence on oath. In his defence, the appellant claimed that the said package which contained the offending drugs was never found tucked in the jeans worn by him as alleged by the prosecution. The appellant pointed the blame to one 'Abu'. According to the appellant, it was 'Abu' who threw the package on the ground. The material parts of the examination-in-chief of the appellant are as follows:

Pada 9.7.2003 jam lebih kurang 2.00 petang selepas bekerja saya berehat Selepas itu saya makan dan terus tidur. Ada lebih kurang 7 orang kawan-kawan saya ketika itu. Saya dengar salah seorang kata 'polis' dan mereka lari. Saya ikut lah. Saya lari kerana saya tidak memiliki passport dan dokumen. Saya dikejar dan kaki saya ditendang, lalu saya terjatuh. Selepas itu saya digari dengan tangan ke belakang. Orang yang menendang kaki saya ialah seorang polis bernama Kpl. Kamal. 7 orang lain terus lari.

Selepas tangan saya digari ke belakang, saya dibawa ke belakang rumah. Pada masa itu itu anggota polis menemui satu bungkusan barang. Saya lihat barang itu dilemparkan oleh salah seorang daripada 7 orang kawan saya tersebut bernama Abu. Saya melihatnya semasa mereka berlari sementara saya berlari di belakang beliau.

Bungkusan itu dibuka di hadapan saya. Salah seorang anggota polis bertanya 'ini barang siapa'. Saya jawab 'saya lihat barang itu Abu yang melemparnya semasa beliau melarikan diri'. Selepas itu saya ditampar oleh seorang anggota polis. Semasa saya katakan barang itu kepunyaan Abu, anggota polis tersebut menampar saya. Saya ada katakan lebih kurang dua kali yang barang itu kepunyaan Abu dan dua kali juga saya ditampar setiap kalinya. Polis itu menuduh barang tersebut milik saya, tetapi saya katakan ianya milikAbu.

[5] At the end of the case for the defence, the learned judge found that the appellant had failed to raise a reasonable doubt on the prosecution's case. Accordingly, the appellant was found guilty and the mandatory death sentence

A was imposed as mandated by the law. He appealed to this court against the decision. We heard the appeal and we unanimously dismissed it.

[6] We now give our reasons for so deciding.

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[7] Learned counsel for the appellant urged us that that the appeal should be allowed principally on the following two grounds:

(a) there is doubt as to the identity of the cannabis which formed the subject matter of the charge; and

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(b) the appellant's defence was not adequately considered by the learned judge.

[8] On the first ground, the arguments of learned counsel were two-pronged. D In the first place it was argued that the cannabis in question was not the cannabis seized due to difference of the weight. It was argued that the gross weight as found by the investigating officer (PW6) was 430g, whilst PW4 said it was 424.6g. For this reason, it was argued that in the absence of any reasonable explanation, the discrepancy in weight of the drugs exhibit created E a doubt as to the identity of the cannabis which forms the subject matter of the charge against the appellant. And secondly, it was contended that there was a break in the chain of evidence concerning the movements of the cannabis. Among other things, it was argued that the exhibits were not properly marked by PW1 before he kept them in a locked cabinet. Learned counsel also argued F that there was doubt as regards the identity of the cannabis since PW1 handed over the exhibit to PW6 some six hours after the seizure. Learned counsel also submitted that PW6 failed to explain what had happened to the cannabis between the time PW4 handed back to him the exhibits on 15 October 2003 and the handing over by PW6 to the storekeeper on 12 December 2003.

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[9] We accept the general principle of law that in a criminal proceedings it is incumbent upon the prosecution to prove that the drugs tendered in court which form the subject matter of a charge were the ones in point of fact seized by the police. Even if there was overwhelming evidence against an accused H person, the court will not be prepared to convict if there is doubt as to the identity of the exhibit. Therefore, the critical question which arose for decision in the instant appeal was whether the cannabis recovered by PW1 from the appellant was the same cannabis sent to and examined by PW4 and subsequently produced in court as evidence.

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[10] The principle of law on this subject matter has been explained by Raus Sharif FCJ (as His Lordship then was) in *Loh Kah Loon v Public Prosecutor* [2011] 4 MLJ 260. In that case, the sole issue before the Federal Court was whether there was doubt as to the identity of the exhibits as the net weight of

the exhibits as found by the chemist was higher than their gross weight as found by the investigating officer of the case, PW8. The chemist's finding was 214.74g while PW8's was 200g; the net weight exceeded the gross weight by 14.74g. It was submitted that the prosecution's failure to explain the reason for the discrepancy cast doubt as to the identity of the exhibits and for that reason the prosecution had not proved its case beyond reasonable doubt. The Federal Court held that the difference in the weight of the exhibits as found by the police and the chemist by itself could not be said to have created doubt as to the identity exhibits. Raus Sharif FCJ in delivering the judgment of the court said:

> It can be seen from the above that there was no break in the chain of evidence regarding the exhibits. The identity of the exhibits was well established. Thus, on the facts of this case, the difference in the weight of the exhibits as found by the police and the chemist, by itself cannot be said to have created doubt as to the identity of the exhibits. The real question is whether the exhibits recovered by the police is the same exhibits sent to and examined by the chemist and subsequently produced in court as evidence. We have no doubt that it was the same exhibits.

[11] Coming back then to the present case, in considering this matter, we had closely scrutinised the entire evidence contained in the appeal record on this aspect. We found no merit in the arguments of learned counsel under this head of complaint. We have no doubt at all that the cannabis tendered in court which form the subject matter of the charge was the one actually seized from the appellant. It could not have been otherwise. PW1 confirmed and identified in court the cannabis which was seized from the appellant's possession. PW1 handed over the same exhibit to PW6 on the same day. The evidence of the PW4 had clearly established that the cannabis which PW6 handed to him for analysis was the very cannabis he wrapped up after analysis, and then returned it to PW6. He also identified the exhibit in court. PW6 also confirmed that it was the exhibit he received back from PW4. The chain of evidence is more important for the period from the time the drugs were recovered until completion of analysis by the chemist (see *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; [2004] 6 AMR 189). What is more, it is not required that each and every officer who handled the exhibits be called by the prosecution (see *Su Ah Ping v Public Prosecution* [1980] 1 MLJ 75). Clearly, there was no break in the chain of evidence regarding the exhibits in the present case. Hence, in our judgment, the difference in the weight of the cannabis as found by PW6 and PW4 by itself could not be said to have created a doubt as to the identity of the cannabis in question. In the circumstances, the complaint by learned counsel for the appellant on the manner in which the exhibits were handled was misplaced.

[12] We turn next to the second ground raised by learned counsel for the appellant. That is, the appellant's defence was not adequately considered by the learned judge. We were unable to agree with this submission.

[13] In the first place, we were of the view that having regards to the facts of the present case, the learned trial judge was justified in finding at the close of the prosecution's case that the appellant was found in possession of the cannabis in question, independently of the presumption of possession under s 37(d) of the Act. In the present case, since the weight of the cannabis exceeded the quantity specified in s 37(da)(vi) of the Act, the learned judge was entitled to invoke the presumption of trafficking and to hold that a prima facie case had been established against the appellant. Possession encompasses the element of physical control as well as an element of knowledge. Knowledge is a matter of fact, which in the nature of things cannot be proved by direct evidence. It can only be proved by inferences from the surrounding circumstances. The learned judge accepted the evidence of prosecution's witnesses that the appellant was found having custody and control over the offending exhibit and this must be the case as the exhibit was found tucked away in front of the jeans worn by him. In this regard, it is an established principle that the credibility of a witness is primarily a matter to be decided by the trial judge. The learned judge also found that the appellant had the requisite knowledge. In our judgment, his finding of knowledge was correctly made upon a consideration of the entire circumstances relating to the arrest and the findings of the cannabis. In our judgment, the learned judge directed himself quite rightly along the approach indicated *Public Prosecutor v Abdul Rahman Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337 and *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19.

[14] Now, the appellant had presented a differing version of how the cannabis was recovered by the police. It was the appellant's version that the package was never found tucked in the jeans as alleged by the prosecution. The appellant's explanation was that he was sleeping when the police laid ambush at the construction site. There were about seven other workers at that time. When he heard someone shouting there was police, he ran away because he did not have a valid document to enter into Malaysia. It was suggested by the appellant that it was 'Abu' who threw the package on the ground. On the other, it was the case for the prosecution that the cannabis was actually found in a package tucked in his jeans worn by him.

[15] Given these two versions, the learned judge must consider whether the appellant's version had cast a reasonable doubt on the truth of the prosecution's case in deciding the issue of the guilt or innocence of the appellant. In considering the version of the appellant which was diametrically opposite to the version of the prosecution, the learned judge should not approach the question of the guilt or innocence of the appellant on the basis of determining which of the two versions should be accepted (see *Mohamed Yatin bin Abu Bakar v Public Prosecutor* [1950] MLJ 57).

[16] A scrutiny of the judgment of the learned judge reveals that he has

carefully considered and judicially appreciated the two versions before coming to a definite finding of fact that the appellant had not created any reasonable doubt on the prosecution's case. In the words of the learned judge:

> Versi tertuduh sedemikian berdasarkan alasan-alasan yang sama, bukan sahaja sukar dipercayai tetapi juga gagal menimbulkan sebarang keraguan yang munasabah ke atas kes pendakwaan.
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> Oleh itu pendakwaan telah berjaya membuktikan kesnya 'beyond reasonable doubt'.

[17] We found that the learned judge had not misdirected himself on the law. In our judgment, having regards to the totality of the evidence, the learned judge was perfectly entitled to come to that finding of fact. The learned judge had the benefit of the audio visual advantage of hearing and seeing the witnesses. We did not have that advantage. It is not our function to substitute our findings for that of the trial court. In any event, we found no plausible reason at all to disturb the findings of the learned judge.

[18] Further on this point, we note that a serious allegation by the appellant as to the manner and the circumstances in which the cannabis was actually recovered, according to his version, tantamount to a grave accusation of fabrication by the police to frame-up the appellant. However, there is no evidence at all to point to a reason or motive why the police witnesses would want to fabricate the evidence to frame-up the appellant.

[19] For all these reasons we found no merits in this appeal. We had therefore, dismissed it. We affirmed the conviction and the sentence of death imposed by the learned judge upon the appellant.

Appeal dismissed.

Reported by Kohila Nesan